



Supreme Court of the United States



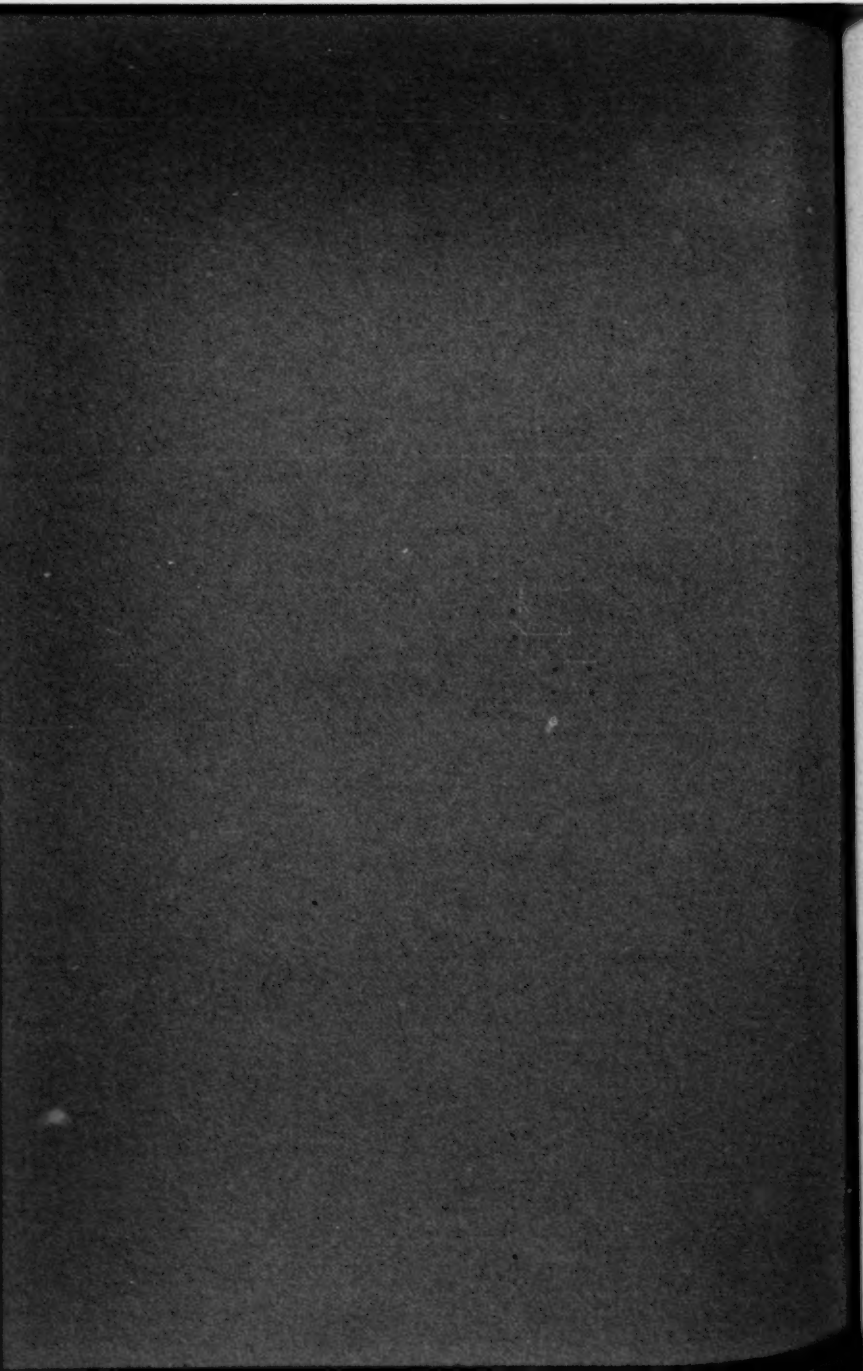
No. 1004-1005

October Term, 1942

EASTERN TRANSPORTATION COMPANY

ETHEL E. WALLING and HELEN T. WALLING
Plaintiffs

vs.
THE UNITED STATES OF AMERICA
Defendant



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IN THE
Supreme Court of the United States.

No.

OCTOBER TERM, 1945.

EASTERN TRANSPORTATION COMPANY,

Petitioner,

v.

RITNER K. WALLING AND MARTUG TOWING
COMPANY,

Respondents.

**BRIEF IN OPPOSITION TO PETITIONS FOR WRITS
OF CERTIORARI.**

The petitions should be denied.

I. There has been a correct interpretation of the Pilot Rule regulating lights to be displayed upon a barge with two tugs abreast, in an inland canal, which Rule follows:

“Barges or canal boats towing alongside a steam vessel shall, if the deck, deck houses, or cargo of the barge or canal boat be so high above water as to obscure the side lights of the towing steamer when being towed on the starboard side of the steamer, carry a green light upon the starboard side; and when towed on the port side of the steamer, a red light on the port side of the barge or

Note: The petitioner has only filed as the record its own appendix in the Circuit Court of Appeals for the Third Circuit. The Court considered other testimony than that in the Appendix, being testimony incorporated in the briefs of both the respondents, and so that that testimony may be available, as well as the entire record, the respondent here is printing as an appendix that portion of its testimony which is in addition to that set forth in the petitioner's appendix; and likewise, the entire record has now been sent to your Honorable Court by the Circuit Court of Appeals.

canal boat; and if there is more than one barge or canal boat abreast, the colored lights shall be displayed from the outer side of the outside barges or canal boats." (App. 96, 97.)

(It is to be noted that petitioner in its brief has not copied the rule in full.)

The facts are as follows, which are from the Findings of the Trial Judge:

"4. * * * Prior to leaving Town Point that evening the Mamei under orders of Captain Middleton was exhibiting two white all horizon lights 6' apart on a cross-arm aft of her wheel house, and 6' above it, and such lights were 36 to 38' above the surface of the water. She also had a stern light which showed aft; and a white light which was hung on her bow 6 or 7' feet from her forward rail, in accordance with the custom pursued by vessels navigating in the Chesapeake & Delaware Ship Canal to show an oil white light on the port bow of a barge navigating those waters in tow of tug or tugs alongside. In addition the lights inside the forecastle were lighted and some light could be seen from them, but no portion of these lights showed forward." (App. 82a, 83a)

"5. The tug Caspian * * * was exhibiting red and green running lights at a point about 20' aft of her stem on top of her pilot house, and about $21\frac{1}{2}$ ' from the surface of the water; she also had two white towing lights arranged vertically on her forward mast five feet aft of her stem, the top light being 42' and the lower one being 38' above the surface of the water, both showing all around the horizon." (App. 83a)

"6. That the tug Hudson was exhibiting red and green running lights on top of her pilot house, 24' above the surface of the water, and she had a white range light forward 15' above the surface of the water, as well as

two white towing lights vertical on her mast, the top one being 44' and the lower one 39' above the surface of the water, and both of them showed all around the horizon." (App. 83a)

The barge had four kingposts on each side of her main-deck forward of the bridge, spaced fifty feet apart fore and aft, fifteen feet from side to side, eighteen inches in diameter and twenty feet high. These kingposts were about twenty-eight feet above the water and as the learned Trial Judge found (Finding No. 4, App. 83a) the slight curvature of the canal at the point of collision provided, at most, but momentary obstruction to the running lights of the Caspian and a competent lookout in view of this space could have observed the same. It is also a fact that at all times Captain White of the Montrose could see the green light of the Hudson, which was on the far side of the flotilla. In addition, in the ninth article of the answer of the petitioner to the libel, the petitioner admits that it saw the lights, because it states as follows:

"* * * Shortly thereafter she saw the running lights of a vessel on the south shore. The 'Montrose' kept steerageway intending to pass between these two indicated vessels. *As she came nearer she discovered the aforesaid lights were on two small tugs, the 'Hudson' and the 'Caspian,' which had a large ocean-going barge between them.* Upon discovering the situation the 'Montrose' stopped and backed, but nevertheless collision happened." (Italics ours)

The Circuit Court held that the foregoing Pilot Rule, by its very terms, did not apply to the situation here existing, in which the barge was being towed by two tugs, one on either side (App. 97a):

"We are unable to find any statutory rule, or one based upon statutory power, which requires a barge being towed by a tug on either side to display her run-

ning lights as asserted by appellant. The omission to so provide cannot be regarded as a mere oversight. On the contrary, it seems to us that such an omission must be regarded as intentional. There is a sound practical reason for this: since the barge has a tug on each side, the outboard running light of each tug would compensate for any inability to see the inboard running light of the other tug. Thus, in the case at bar, even assuming an obscuration of Caspian's starboard light by the king posts, since Caspian was on Mamei's port quarter and Hudson was on Mamei's starboard quarter, Hudson's starboard light admittedly not obscured would compensate for any lack of sight of Caspian's starboard light. It may very well be that exhibition by Mamei of both her running lights in this situation would merely serve to confuse a vessel approaching from an opposite direction. Since neither Congress nor the navigational authorities have made any requirement that a barge being towed by a tug on either side should display both her running lights in circumstances like those under discussion, we must conclude that no reason exists for such requirement, and consequently we should be hesitant to find one in this case.

“In any event, we are not convinced that any obscuring of Caspian's lights either existed in the case at bar or contributed to the collision.”

Judge Biggs filed a concurring opinion, but in it he was of the opinion that the above interpretation of the Rule will heighten the risk of collision in the inland waters (App. 101). In that, we feel he is clearly in error and we believe that that is the opinion of seafaring men who are familiar with lights in the inland waters. In other words, the more lights would tend to heighten the risk instead of lessening it.

II. There is no conflict of authority between the decision of the Third Circuit in this case and any other Circuit with reference to the absence of a lookout at the bow of the barge. The facts in that connection are as follows:

Captain Middleton, in charge of the towing operation, was on the bridge of the "Mamei" at the time of the collision, together with Captain Paulsen of the barge and the helmsman. The view forward from the bridge was unobstructed; the testimony showed that eye-level for a man five feet tall would be 1½ feet above the top of the king-posts (App. 60a).

Captain Middleton and Captain Paulsen each observed the lights of the tug "Montrose" as soon as the slight curve in the canal brought her within view; Captain Middleton estimated that the "Montrose" was ½ mile away at that time (App. 8a). Both captains continued to observe the oncoming tug, and they described her movements in detail from the time they first sighted her until she changed course and crashed into the bow of the barge (App. 8a to 10a; 62a and 63a).

The opinion of the Circuit Court stated (App. 99a):

"We conclude that 'Mamei's' lookouts were proper under the circumstances since Captain Middleton and Captain Paulsen had an obstructed view: *The Catalina*, 95 F. 2d 283 (C. C. A. 9, 1938); *Puratich v. United States*, 126 F. 2d 914 (C. C. A. 9, 1942). . . .

"Under the circumstances of this case, we conclude that the presence of lookouts up forward on the 'Mamei' would not have prevented the collision."

Petitioner complains that the Circuit Court improperly shifted the "burden of proof" on the adequacy of lookouts, and its connection with the collision. We do not so understand the language of the opinion. The Court said (App. 99a):

"In any event, appellant would have to show not only that there was an absence of proper lookouts but also

that such a lack of lookouts contributed to the collision. Fault alone is insufficient to engender liability. Causal relationship between the fault and the collision is essential."

Absence of proper lookout on the "Mamei" is an affirmative defense asserted by petitioner, on which it has the burden of proof. If petitioner had established fault, respondents would then have been required to adduce proof that such fault not only did not cause or contribute to the collision, but that it could not possibly have been a causative or contributing factor: *The Pennsylvania*, 86 U. S. 125 (1873).

The testimony shows, and the Circuit Court held, that there was no such fault.

(a) Sufficient reason has been shown for not placing a lookout at the bow of the barge.

(b) All the cases referred to by the petitioner are distinguishable, and certainly do not conflict.

Conclusion.

We repeat, the petitions should be denied.

Respectfully submitted,

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